

STATE OF MICHIGAN
COURT OF APPEALS

DELORES TYLER,

Plaintiff-Appellant,

v

McCORD'S FARM MARKET, INC.,

Defendant-Appellee,

and

GREAT LAKES AUTOMATIC DOOR, INC.,

Defendant.

UNPUBLISHED

July 30, 2013

No. 312531

Ionia Circuit Court

LC No. 2011-028523-NO

Before: SAWYER, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant McCord's Farm Market, Inc., summary disposition pursuant to MCR 2.116(C)(10). Plaintiff challenges the trial court's ruling that she failed to show that a genuine issue of material fact existed regarding whether defendant's grocery store doors were a dangerous condition that presented an unreasonable risk of harm and regarding whether defendant knew or should have known that its doors constituted a dangerous condition.¹ We affirm.

We review a trial court's decision on a motion for summary disposition de novo. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A motion under MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim." *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). Summary disposition may be granted under MCR 2.116(C)(10) where "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." When reviewing a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). The reviewing court must view the evidence in the light most favorable to the party

¹ Plaintiff stipulated to the dismissal of her claim against Great Lakes Automatic Door, Inc.

opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). “There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party.” *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

“In a premises liability action, a plaintiff must prove (1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached the duty, (3) that the defendant’s breach of the duty caused the plaintiff’s injuries, and (4) that the plaintiff suffered damages.” *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007). The duty that a landowner owes depends on the visitor’s status. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). Here, it is undisputed that, as a customer of defendant’s store, plaintiff was an invitee. See *Benton v Dart Props, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006) (recognizing that “[a] person invited on the land for the owner’s commercial purposes or pecuniary gain is an invitee”) In regard to invitees, “a landowner owes a duty to use reasonable care to protect invitees from unreasonable risks of harm posed by dangerous conditions on the owner’s land.” *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012). This duty is breached “when the premises possessor knows or should know of a dangerous condition on the premises of which the invitee is unaware and fails to fix the defect, guard against the defect, or warn the invitee of the defect.” *Id.*

As an initial matter, plaintiff asserts that the trial court failed to properly articulate a ground for granting summary disposition. However, the trial court found that there was no genuine issue of material fact in regard to whether defendant’s doors constituted a dangerous condition and in regard to whether defendant knew or should have known that the automatic door created an unreasonable risk of harm to invitees. As discussed *infra*, these were proper grounds for the grant of summary disposition.

Also, plaintiff characterizes her arguments before the trial court as asserting that defendant’s outdated door sensor systems caused plaintiff’s injuries. Plaintiff argues that because the trial court did not specifically reference defendant’s door sensors within its opinion (the trial court instead referred to defendant’s “automatic door”), the trial court failed to consider defendant’s duty in regard to its door sensors. However, in its opinion, the trial court relied heavily on the testimony of Thomas Livernois, plaintiff’s expert witness, that defendant’s doors were not unreasonably dangerous or defective. Livernois’ opinion in regard to the safety of defendant’s doors was based on his extensive discussion of the operation of defendant’s door sensors. Accordingly, plaintiff’s assertion that the trial court failed to address the safety of defendant’s door sensors within its opinion has no support within the record. Rather, it appears that the trial court logically and appropriately connected the operation of defendant’s sliding automatic doors to the operation of defendant’s door sensors and collectively addressed the safety of both when it referred to defendant’s “automatic doors.”

Turning to the merits of the trial court’s grant of summary disposition, plaintiff correctly notes that the trial court relied heavily on Livernois’ expert testimony that defendant’s doors were not unreasonably dangerous. On appeal, plaintiff argues that, regardless of Livernois’ expert testimony, Jerry Kuepfer’s and Bruce Johnson’s testimony established a genuine issue of material fact in regard to whether the danger posed by defendant’s door sensors was reasonable. Kuepfer and Johnson were former employees of Great Lakes Automatic Door, Inc., the company defendant used to service its automatic doors.

In this case, Kuepfer testified that in October 2006, he included a note in his invoice to defendant that all four of defendant's doors needed sensor upgrades to meet Association of Door Manufacturers standards. In August 2009, Johnson informed Robert Meyers, the coowner of the store, that "[a]ll doors need [a] sensor upgrade to meet current ANSI [American National Standards Institute] Standards." Plaintiff argues that "[i]t would be well within the common knowledge and experience of the jury to determine the unreasonableness of the hazards of the outdated sensors, given the evidence that on two occasions it was recommended that the sensors be upgraded, and that both times Defendant-Appellee failed to do so."

However, the mere fact that Kuepfer and Johnson informed defendant that its door sensors did not comply with current industry standards does not necessarily require the conclusion that the sensors were a dangerous condition posing an unreasonable risk of harm. Before one could determine that the sensors' noncompliance meant that they were a dangerous condition, plaintiff would have to present evidence of what the standards were and why noncompliance with those standards presented a danger. And, plaintiff acknowledges that "[t]he only conceivable time when an expert would be absolutely required by the evidence of the case would be to discuss standards or regulations." Thus, by plaintiff's own admission, expert testimony was necessary to determine whether the sensors were a dangerous condition in this case.

Here, Livernois provided the needed expert testimony. He testified that defendant's doors were compliant with the industry standards when they were installed in 2004 but that those standards changed in 2005. He testified that defendant's door sensors could potentially allow the doors to close on a person's toes or shoulder if a person stood motionless in front of a door for several seconds without tripping the two beam sensors within the door. Livernois testified that if defendant's door sensors had been upgraded to include a presence sensor as recommended by the industry standards, defendant's door would have remained open even if someone stood motionless in front of them. However, Livernois testified that defendant's doors were not unreasonably dangerous or defective at the time of plaintiff's accident, even in the absence of the recommended presence sensors. Accordingly, the testimony of Kuepfer, Johnson, and Livernois did not provide evidence that indicated that defendant's doors were a dangerous condition that presented an unreasonable risk of harm.

Plaintiff suggests that the fact that one of defendant's doors also closed on Barbara Heise on a subsequent occasion indicates that defendant's doors had a high probability of failing to sense a person walking through a door. However, Heise acknowledged that she had paused briefly in front of one of defendant's doors to consider whether she wished to pick up a coupon flier, and there is no indication that defendant's door operated in a manner inconsistent with the capabilities of its sensors as described by Livernois. Thus, Heise's testimony does not contradict Livernois' conclusion that defendant's doors were not unreasonably dangerous or defective.

Plaintiff also argues that her injuries revealed the high magnitude of harm that could be caused by defendant's door, which could indicate that defendant's doors posed an unreasonable risk of harm. However, the injuries suffered by a particular plaintiff may not be considered in determining the extent of the risk created by a condition. See *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 518-519 n 2; 629 NW2d 384 (2001). And, there was no evidence presented to the trial court that showed that injuries such as the injuries suffered by plaintiff would typically be caused by defendant's doors. Thus, the extent of plaintiff's injuries does not contradict

Livernois' conclusion that defendant's doors were not unreasonably dangerous or defective. The trial court did not err in finding that there was no genuine issue of material fact in regard to whether defendant's doors were a dangerous condition that presented an unreasonable risk of harm. MCR 2.116(C)(10); *Hoffner*, 492 Mich at 460.

Moreover, even if there were evidence that supported that finding, there was no evidence that defendant breached its duty in regard to its doors. While both Kuepfer and Johnson suggested that defendant replace its door sensors because they were not in compliance with current industry standards, neither Kuepfer nor Johnson explicitly remembered informing defendant's representatives of why the sensors were not compliant, or whether the sensors' noncompliance was dangerous to customers. Kuepfer did testify that it was his "normal procedure" to "tell them why [the sensors were noncompliant]. A lot of times I'll take them over and show them if you stand here in the beams, I'll point to the beams, if you stand here you're not quite in the beams." However, even assuming that Kuepfer explained to one of defendant's representatives that defendant's doors were noncompliant with the 2006 industry standards because a person could stand in a doorway without necessarily tripping one of the door's sensor beams, that information would not provide defendant with a basis to conclude that its doors constituted a dangerous condition, especially where defendant's doors also had Doppler sensors that would detect movement. Also, defendant's doors were compliant with industry standards when they were installed in 2004. There is no indication that Kuepfer told defendant's representatives that defendant's doors' subsequent noncompliance with the 2006 industry standards made the doors unsafe. Additionally, accordingly to Meyers, Johnson told him in 2009 that the existing sensors were "working correctly," even as Johnson recommended that Meyers buy new sensors for all of the doors to meet ANSI standards. Thus, there is no indication in the record that defendant knew or should have known that its doors' noncompliance with industry standards meant that they were a dangerous condition. The trial court did not err in finding that there was no genuine issue of material fact in regard to whether defendant knew or should have known that its doors constituted a dangerous condition. MCR 2.116(C)(10); *Hoffner*, 492 Mich at 460.

Because there was no evidence that defendant's doors were a dangerous condition that presented an unreasonable risk of harm or that defendant knew or should have known that its doors constituted a dangerous condition, there was no evidence that defendant owed or breached a duty to plaintiff. *Id.* Accordingly, plaintiff failed to offer proof to support two of the elements of her premises liability action. *Kennedy*, 274 Mich App at 712. Because there is no genuine issue of material fact and defendant is entitled to judgment as a matter of law, the trial court properly granted summary disposition under MCR 2.116(C)(10).

Defendant argues an alternate ground for affirmation under the open and obvious doctrine. Because we affirm on the grounds discussed *supra*, we need not address that argument. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

Affirmed.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Pat M. Donofrio